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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the City of Santa Rosa for Approval to Construct a Public Pedestrian and Bicycle At-Grade Crossing of the Sonoma-Marin Area Rail Transit ("SMART") Track at Jennings Avenue Located in Santa Rosa, Sonoma County, State of California.	A1505014

REPLY ISSUE BRIEF

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29 April 2016

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of the City of Santa Rosa for Approval to Construct a Public Pedestrian and Bicycle At-Grade Crossing of the Sonoma-Marin Area Rail Transit ("SMART") Track at Jennings Avenue Located in Santa Rosa, Sonoma County, State of California.	Application No. 15-05-014

REPLY ISSUE BRIEF

In accordance with the Schedule set in the Scoping Memo, James L. Duncan (Duncan), a party in this proceeding, A1505014, respectfully submits this Reply Issue Brief.[1]

David Stewart (Stewart) is the primary expert witness of the Safety and Enforcement Division (SED) in this proceeding. Stewart submitted the Prepared Testimony of David Stewart, February 25, 2016, (Stewart's Testimony) and was SED's expert witness during the Evidentiary Hearing, March 14, 2016.

Stewart cites the policy of the Association of American Railroads (AAR), a private organization which primarily represents the interests of privately owned freight railroad companies,[2] supporting "a freeze on the overall number of [at-]grade [rail] crossings within each state."[3] When Stewart was asked, "is [the AAR crossing freeze policy] the policy of the CPUC that you are aware of or that one could locate through research?", he answered, "It is not a written policy, no."[4]

[1] Throughout this proceeding Duncan has raised legal issues regarding the extent of the CPUC's jurisdiction over rail crossings in the SMART transit district. Nothing in this Reply Issue Brief is intended to waive any previous argument submitted by Duncan nor to concede to any argument submitted by the CPUC or the CPUC's Safety and Enforcement Division regarding these jurisdictional issues.

[2] https://en.wikipedia.org/wiki/Association_of_American_Railroads (as of April 28, 2016)

[3] Stewart's Testimony, p.4, lines 13-23.

[4] Evidentiary Hearing Transcript, p.179, lines 3-12 (Transcript) (All following citations will be to this Transcript unless indicated otherwise.)

When Stewart was asked "if the [the AAR crossing freeze policy] has become a policy of the ... CPUC?" he responded, "The commitment to reduce the number of rail crossings in the State of California has become a policy of the CPUC." When asked to clarify, "[a]nd that is different than the policy of the AAR?" he replied, "It's a parallel policy, that I think the AAR goes a step farther by doing -- being more proactive in their method of doing that."[5] This "parallel policy" is presumably the policy previously detailed in Stewart's Testimony:

> Q. What is the Commission's policy in regards to new at-grade highway-rail crossings?
>
> A. It is the policy of the Commission to reduce the number of at-grade highway-rail crossings in California. Section 2 of Commission General Order (GO) 75-D, titled, POLICY ON REDUCING NUMBER OF AT-GRADE CROSSINGS, states, "As part of its mission to reduce hazards associated with at-grade crossings, and in support of the national goal of the Federal Railroad Administration (FRA), the Commission's policy is to reduce the number of at-grade crossings on freight or passenger railroad mainlines in California." As part of its policy, the Commission generally does not approve the construction of new at-grade highway-rail crossings unless the applicant can provide substantial evidence that a grade separation is not "practicable" and that there exists a compelling public need.[6]

Even though Stewart asserts that grade separation of rail crossings and the public need for a rail crossing are parts of this "parallel policy", in fact CPUC GO 75-D, POLICY ON REDUCING NUMBER OF AT-GRADE CROSSINGS, provides no guidance – i.e., standards, quantification, or methodology – as to its application.

When Stewart is asked the basis for his assertion, he answers that it is "California Public Utilities Code" but could not specify which code, only that it is "in the California Public Utilities Code."[7] Later, Stewart goes on to "clarify" saying that it was "actually in the California Public Utilities Rules of 3.7 (c)."[8] The relevant part of Rule 3.7 (c), Public Road Across Railroad states:

> Applications to construct a public ... street across a railroad must be made by the ... governmental authority that proposes the construction. Such applications ... shall contain the following information: ... (c) If the proposed crossing is at grade, (1) a statement showing the public need to be served by the proposed crossing; (2) a statement showing why a separation of grades is not practicable; ...

[5] Transcript, p.198, lines 14-25.
[6] Stewart's Testimony, p.3, lines 11-22.
[7] Transcript, p.135, lines 11-28.
[8] Transcript, p.141, lines 10-18.

Rule 3.7 (c) does not detail the basis for its requirements (1) and (2), nor does it define "practicable". The Protest of the Safety and Enforcement Division,[9] however, does provide an initial perspective, and establishes that the City was initially advised that it must either build a grade separated structure or must close other nearby at-grade crossings in exchange for an at-grade crossing at Jennings Avenue; otherwise the Application would be denied:

> 3. Staff has been working with the City for over a year on this project and has participated in numerous meetings. During this period, SED has repeatedly advised the City that it will oppose a new at-grade crossing at this location unless the crossing is grade separated or other at-grade crossings in the immediate vicinity are closed. SED has advised the City that there are three nearby at-grade crossings at 6th, 7th, and 8th Streets within the City limits which are good candidates for at-grade crossing closures.
>
> 4. The City had presented SED with workable design plans for a grade separated structure at a meeting on May 6, 2014. The City applied for and was awarded an $8 million grant to construct a grade separated structure at Jennings Avenue. However, the City has since turned down the grant based on neighborhood opposition to the overpass structure for the grade separated crossing.
>
> 5. By rejecting the grade separation, the City has failed to demonstrate that a grade separation at Jennings Avenue is not practicable as required under Rule 3.7(c)(2), Public Utilities Code § 1202(c), and *City of San Mateo v. Railroad Comm'n of California* (1937) 9 Cal. 2d 1.

While failing to define "practicable", SED's Protest nevertheless asserts that the City has failed to demonstrate that a grade separation at Jennings Avenue is not practicable. Stewart, however, does provide what the CPUC's definition of "Practicable" or "Practicability" is in SED's actual practice:

> Q. Your testimony addressing the practicability of a separated grade crossing, does not address any factor other than whether the separated grade crossing could be physically constructed and potentially financed; isn't is [sic] that correct?
>
> A. Yes.[10]

[9] Protest of the Safety and Enforcement Division, filed June 4, 2016, pp. 2-3.

[10] Transcript, p.137, lines 3-9.

It has been noted in this proceeding that at-grade pedestrian and bicycle crossings were approved in San Clemente; however, SED asserts that the circumstances there made "grade separated structures difficult or impossible to build"[11] – i.e., they were not practicable. In other locations, even where it would have possible to build a grade separated crossing, at-grade crossings have been approved contingent on the closure of other rail crossings.[12] Stewart further confirms that an at-grade rail crossing application will be denied when a separated grade rail crossing would be physically possible and could be financed:

> Q. So if there were circumstances in which a separated grade was physically capable of construction and could be financed, are there circumstances under which you would nevertheless still recommend approval of an at-grade crossing?
> A. If that was the case then I would say no.[13]

As noted above, Rule 3.7 (c) itself does not provide detail to support SED's positions in this proceeding. Rule 3.7 does, however, set forth its authorizing statutes. One of these statutes, Public Utilities Code § 1202 is cited by SED in this proceeding, in particular § 1202 (c),[14] which provides the Commission with "exclusive power ... to require, where in its judgment it would be practicable, a separation of grades at any crossing ... ." § 1202 (c) does not mandate, however, that all rail crossings must be built with a separated grade nor does California history support such an interpretation. In 1917, a few years after Public Utilities Act § 43 (b), the forerunner of § 1202 (c), became effective, the Railroad Commission, the forerunner of the CPUC, approved the Southern Pacific Company's application to construct 35 new rail crossings of streets and highways in San Jose with 34 at-grade crossings and only 1 separated grade crossing.[15] The Guerneville Road at-grade highway-rail crossing in Santa Rosa, visited during the CPUC Site Visit, February 1, 2016, was constructed in the early 1960's and certainly could have been built as a separated grade crossing, but such was not required.

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[11] Opening Brief of the Safety and Enforcement Division, filed April 15, 2016, pp. 14-15.

[12] Decision 15-12-006, December 3, 2015, City of Santa Paula, at-grade highway-rail crossing (public agency owned right-of-way); closure of two crossings, pp. 1-2. Also see Decision 07-07-003, July 12, 2007, San Luis Obispo County Public Works, at-grade pedestrian rail crossing in San Miguel (Union Pacific owned right-of-way), closure of one rail crossing in county and agreement to close another rail crossing in county before applying for another pedestrian crossing in the future. Google Maps shows that the approved rail crossing has not been constructed as of April 28, 2016: https://www.google.com/maps/@35.7553921,-120.6951321,150m/data=!3m1!1e3

[13] Transcript, p.137, lines 17-24.

[14] Protest of the Safety and Enforcement Division, filed June 4, 2016, p. 2.

[15] *City of San Jose v. Railroad Commission of the State of California* (1917) 175 Cal. 284, 285, 287.

The population of California in 1917 was 3 million; in 1961 it was 17 million; in 2014 it was 38 million.[16] Even if crossings of existing streets and highways by new rail lines declined after 1917, the growth of population in California would have necessarily involved the creation of numerous new street and highway crossings of existing rail lines. Currently there are 6,491 public at-grade highway rail crossings in California, compared to only 1,553 public grade separated highway rail crossings. If § 1202 (c) mandated grade separated rail crossings over a century ago, the number of grade separated rail crossings compared to at-grade crossings should be much greater than it is today.[17]

SED's statutory interpretation of the Public Utilities Code produces absurd results.[18] "Agencies and railroads are under no duty to provide absolute safety" at at-grade rail crossings.[19] However, SED insists that absolute safety must be provided by requiring grade separation because, " ... grade separations provide ... ultimate protection ... ."[20] However, if an applicant for a rail crossing "can convince [SED] that they can't build a grade separated structure" then "a diagnostic team ... come[s] up with the safest [at-grade] design for that particular project."[21] In such a situation, if the crossing can then be designed to be safe at-grade, obviously it could have been designed that way in the first place – and would never have needed to be grade separated at all. This is just one of the absurd results of SED's absolute safety policy.

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[16] https://www.google.com/#q=population+of+california (as of April 28, 2016)

[17] California Rail Crossing Safety Action Plan, at p. 66. http://safety.fhwa.dot.gov/xings/docs/sap_ca.pdf

[18] *Gilbert v. Chiang* (2014) 227 Cal. App. 4th 537, 551 [courts will reject. any statutory construction which would lead to absurd results since absurd results are not supposed to have been contemplated by the legislature]. Also see Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation, Veronica M. Dougherty, The American University Law Review Vol. 44 127 ["The absurd result principle in statutory interpretation provides an exception to the rule that a statute should be interpreted according to its plain meaning."]

[19] Railroad-Highway Grade Crossing Handbook Revised Second Edition, August 2007, U. S. Department of Transportation, Federal Highway Administration Railroad-Highway Grade Crossing Handbook Revised Second Edition, August 2007, U. S. Department of Transportation, Federal Highway Administration, p. 20. http://safety.fhwa.dot.gov/xings/com_roaduser/07010/ (as of April 28, 2016)

[20] Opening Brief of the Safety and Enforcement Division, filed April 15, 2016, p. 11. Also see Stewart's Testimony, p.7, lines 15 -16.

[21] Stewart's Testimony, p.134, lines 3 -12.

SED contends that closing existing rail crossings also provides ultimate safety.[22] SED "repeatedly advised the City that it [would] oppose [the Jennings at-grade crossing] unless ... other at-grade crossings in the immediate vicinity are closed. SED [had] advised the City that ... three nearby at-grade crossings at 6th, 7th, and 8th Streets ... are good candidates for at-grade crossing closures." [23] The crossings at 6th, 7th, and 8th Streets are not "in the immediate vicinity" however – even the nearest, at 8th Street, has two intervening at-grade rail crossings, at 9th Street and West College Avenue, between it and Jennings Avenue, which is at least a mile away, [24] and is therefore an unrelated rail crossing. SED acknowledges that closing existing at-grade rail crossings does not make another unrelated at-grade rail crossing safe[25] Further, all of SMART's at-grade rail crossings, including those for 6th, 7th, and 8th Streets, were subject to the review standards of the California Rail Crossing Safety Action Plan 2012-2017 and its stated commitment to eliminate unnecessary or redundant crossings, [26] but no unnecessary or redundant at-grade rail crossings were closed in Santa Rosa.[27] Moreover, in 2012, the CPUC's Rail Transit and Crossings Branch had already approved SMART's requests to upgrade the at-grade rail crossing safety provisions at all the at-grade rail crossings in Santa Rosa, including those at 6th, 7th, and 8th Streets, and found that the upgrades adequately addressed compliance and safety.[28] If the rail crossings at 6th, 7th, and 8th Streets had been found to be unnecessary or redundant they would have been closed; if they could not have been improved to be made safe, SMART's safety improvement applications would not have been approved. Requiring closure of one or more of the at-grade crossings at 6th, 7th, or 8th Streets – which are neither unnecessary, redundant, nor unsafe – as a condition of approval for an unrelated at-grade rail crossing at Jennings Avenue does not provide greater public safety; it only closes safe rail crossings. Again, SED's statutory interpretation produces absurd results.

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[22] Stewart's Testimony, p.5, lines 21 -24.

[23] Protest of the Safety and Enforcement Division, filed June 4, 2016, p. 1.

[24] https://www.google.com/maps/@38.4484941,-122.7270118,15z (as of April 28, 2016). See also Response of the Sonoma County Transportation and Land Use Coalition, Sierra Club, Friends of Smart, and Stephen C. Birdlebough, June 16, 2015, p. 8.

[25] Transcript, p.159, lines 12-13.

[26] Response of the Sonoma County Transportation and Land Use Coalition, Sierra Club, Friends of Smart, and Stephen C. Birdlebough, June 16, 2015, p. 10, and footnote 17.

[27] Transcript, p.182, lines 10-13.

[28] Response of the Sonoma County Transportation and Land Use Coalition, Sierra Club, Friends of Smart, and Stephen C. Birdlebough, June 16, 2015, pp. 9-10, and footnote 16.

City staff had held preliminary discussions with CPUC staff regarding an at-grade rail crossing at Jennings when there was a possibility that SED would require one or more unrelated rail crossings in Santa Rosa to be closed. These discussions addressed specific warning devices that would be in compliance with applicable state and federal standards and regulations[29] and also included the specific design features SED would require for approval.[30] If the rail crossing at Jennings Avenue could not be made safe as an at-grade rail crossing, CPUC staff would not have discussed with City staff the specific safety devices that would be required, nor would the approval have been contingent simply on the closure of one or more unrelated at-grade rail crossings. If, as is the case with Jennings Avenue, an at-grade rail crossing can be improved to meet all specific safety requirements, it is absurd to maintain that it should then have its approval contingent upon the closure of unrelated crossings.

Other than the crossing at Jennings Avenue, all of Santa Rosa's at-grade rail crossings are for multiple use – motor vehicle, pedestrian and bicycle traffic. SED maintains that all at-grade rail crossings should be subject to identical standards for approval, whether they are dedicated for pedestrian and bicycle use only, or serve motor vehicles as well.[31] SED's interpretation creates an absurd result: at-grade rail crossings with motor vehicle traffic present far greater safety hazards to pedestrians, bicyclists, and trains than at-grade rail crossings limited to pedestrian and bicycle use.[32]

Santa Rosa's rail crossings are at-grade and are all substantially comparable.[33] Furthermore, as noted above, the CPUC approved all of SMART's applications to upgrade the

[29] Jennings Avenue Pedestrian and Bicycle Rail Crossing Project, Draft EIR, Preferred Project -- At-grade Rail Crossing, pp. 3-12.22 & 3-12.23.

[30] Transcript, p.214, lines 3-25.

[31] Transcript, p.136, lines 1-1.

[32] Response of the Sonoma County Transportation and Land Use Coalition, Sierra Club, Friends of Smart, and Stephen C. Birdlebough, June 16, 2015, p. 8. See discussion of history of federal railroad law noting change in legal standards related to introduction of motor vehicles. Railroad-Highway Grade Crossing Handbook Revised Second Edition, August 2007, U. S. Department of Transportation, Federal Highway Administration Railroad-Highway Grade Crossing Handbook Revised Second Edition, August 2007, U. S. Department of Transportation, Federal Highway Administration, pp. 11-12. http://safety.fhwa.dot.gov/xings/com_roaduser/07010/ (as of April 28, 2016)

[33] The only exception to at-grade crossings in Santa Rosa is the Pierson Reach Bike and Pedestrian Path, an undercrossing. CPUC Decision No. 03-05-010, May 8, 2003.

crossings' safety provisions,[34] yet none of Santa Rosa's upgraded crossings feature pedestrian channeling or gates. An at-grade rail crossing at Jennings Avenue with channeling and gates and other improvements, comparable to those at the West Copeland Creek Trail at-grade pedestrian and bicycle rail crossing in nearby Rohnert Park,[35] would be safer for pedestrians and bicyclists than other Santa Rosa rail crossings. It is absurd to require grade separation at Jennings Avenue when only reasonable and appropriate upgrades were required at other Santa Rosa rail crossings.

SED states that the financial cost of providing grade separations is given almost no consideration in actual practice by the CPUC.[36] SED has emphatically criticized the Santa Rosa City Council's decision to select an at-grade crossing at Jennings Avenue rather than an overcrossing, and especially the Council's decision, including their concern to be responsible stewards of public funds, to give up a grant to build an overcrossing.[37] If the City had agreed to close one or more unrelated at-grade crossings as urged by the CPUC, an application for an at-grade crossing at Jennings Avenue would have been approved to those safety standards which had already been discussed with the SED staff; at that point, any possible funding for an overcrossing would have become irrelevant and moot. It is absurd for SED to disregard the ultimate financial cost to the public of providing grade separation and then to object when the representatives of the public act to conserve public funds and select a rail crossing project that SED itself has previously established as safe.

Stewart notes that closing a rail crossing requires balancing public necessity, convenience, and safety as well as economic considerations. [38] When asked what the nexus is between those considerations and the CPUC's requirements for separated grades, Stewart responds that there is none because those considerations are limited only to crossings closures.[39]

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[34] Response of the Sonoma County Transportation and Land Use Coalition, Sierra Club, Friends of Smart, and Stephen C. Birdlebough, June 16, 2015, p. 10. Also see Google Maps to view all rail crossings.

[35] West Copeland Creek Trail Pedestrian and Bicycle At-grade Rail Crossing, Rohnert Park https://www.google.com/maps/@38.3433376,-122.6988998,3a,75y,97.79h,76.51t/data=!3m6!1e1!3m4!1sdBzpbNsGuldeCBDvx3bCfQ!2e0!7i13312!8i6656 (as of April 28, 2016)

[36] Transcript, p.142, lines 5-8.

[37] Protest of the Safety and Enforcement Division, filed June 4, 2016, pp. 2-3.

[38] Stewart's Testimony, p. 5, line 29 & p. 6, line 1-7.

[39] Transcript, p.183, lines 13-28 & p. 184, line 1-7.

Although § 1202 (a) through (c) grants the CPUC authority over railroad crossings, in privately owned railroads, for both existing and proposed rail crossings, SED's interpretation produces absurd results. Public necessity, convenience, and safety as well as economic considerations are undoubtedly issues that will require resolution in cases involving crossing closure, the creation of new crossings, or as in this application, improvement of existing crossings.

Once again, SED inappropriately cites *San Mateo v. Railroad Commission* (1937) 9 Cal.2d 1, a 79-year-old case in which the narrowly limited issue before the court was whether the City of San Mateo and other charter cities had jurisdiction over rail crossings within their city limits or whether the Railroad Commission had jurisdiction under Public Utilities Act Section 43 (pages 6-7). Not only is SED citing *dicta*, it is inapplicable to this proceeding: for over a half century there has not been any automobile, much less "heavy automobile" traffic, on the Jennings at-grade rail crossing, nor will there be in the foreseeable future – City's Application is limited to a pedestrian and bicycle at-grade rail crossing. It would be more appropriate to cite the *San Mateo* court opinion for its observation that the Railroad Commission directed that the rail crossing reductions involved should be accomplished "*consistent with the public convenience and providing adequate protections at the crossings to be used*." (p. 4) (Italics added.)

SED collaterally attacked both the Draft and Final Jennings Avenue Pedestrian and Bicycle Rail Crossing Project EIR as grounds for denial of the City's Application.[40] A Motion to Strike SED's testimony was filed contending that this collateral attack was time-barred by a 30-day statute of limitations.[41] The Motion to Strike was denied at the beginning of the Evidentiary Hearing without written opinion.[42] There was no waiver of the statute of limitations expressed during the hearing.[43] That this aspect of the Motion to Strike was legally correct is supported by a CPUC decision cited by SED, *City of San Mateo v. SoPac Transp. Co.*, (1982) Decision 82-04-033, at pp. 5-7, in which a substantially similar collateral attack on an EIR by CPUC staff was held by the ALJ to be time-barred.

[40] Stewart's Testimony, p.2, lines12-15 and elsewhere in the Testimony.
[41] Motion to Strike Prepared Testimony of David Stewart, filed March 10, 2016, pp. 2-3, and elsewhere.
[42] Transcript, p.75, lines 21-22.
[43] Transcript, p.72, line 27-28, p. 73, lines 1-4, 16-22, 25-28, p.74, line 1.

SED misses the import of *City of San Mateo v. SoPac Transp. Co.*, (1982) Decision 82-04-033. In that decision, the ALJ had determined that the specific conditions of that site, the level of motor vehicle traffic, and the available at-grade warning device technology were such that it would not be possible to have a safe new at-grade crossing at that location. If a new at-grade crossing at that location could never be made safe, then no subsequent discussion of whether the city could afford to build an overcrossing, or if it could be built at all, would change the only available options: a separated grade crossing or no crossing. The ALJ's opinion on practicability is simply *dicta*. No crossing has ever been built at this location, Laurie Meadows Drive, in San Mateo; rather, a hybrid, separated grade crossing was built a block away, at 42nd Avenue.[44] [45] In the case of Decision 82-04-033, there had never been an at-grade rail crossing at Laurie Meadows Drive and there is not one now; in contrast, the at-grade rail crossing at Jennings Avenue has been in continuous use for over 110 years.[46]

SED asserts that the Commission does not approve applications for at-grade rail crossings unless the applicant provides substantial evidence that there exists a *compelling* public need.[47] (Italics added.) Rule 3.7 (c) (1), however, only requires an applicant for an at-grade crossing to provide a statement showing "the public need" to be served, but does not specify that the stated need must be "compelling" in any way. The statutory foundation for Rule 3.7 is Public Utilities Code §§ 1201 and 1202, neither of which require any such statement of public need. In this proceeding, the 110-year history of continuous public use confirms conclusively both the past and future public need for continuing an at-grade rail crossing at Jennings Avenue.

In yet another example of absurd results, SED cites *Blue Line*, Decision 02-05-047 (2002), at p. 13, "*Applicant bears the heavy burden of proving safety, rather than protestants proving unsafe conditions*." (Italics added by SED.) The rail divisions of the CPUC are

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[44] Hybrid separated grade rail crossing at 42nd. Avenue in San Mateo. https://www.google.com/maps/@37.5305007,-122.2884921,151m/data=!3m1!1e3 (as of April 28, 2016)

[45] The San Mateo rail crossing at issue in *City of San Mateo v. Railroad Commission*, the Thirty-ninth Avenue crossing, is located on block away from Laurie Meadows Drive, San Mateo, that was in issue in CPUC Decision 82-04-033. https://www.google.com/maps/@37.5314284,-122.2897847,585m/data=!3m1!1e3 (as of April 28, 2016)

[46] Response of the Sonoma County Transportation and Land Use Coalition, Sierra Club, Friends of Smart, and Stephen C. Birdlebough, June 16, 2015, p. 6.

[47] Transcript, p.135, lines 11-17.

presumably expert in engineering safe rail crossings. When the rail divisions recommend that a rail crossing application be denied for reasons of unsafe design, there is a presumption that they have a greater level of expertise than that of the applicant. If the CPUC's experts have a level of expertise which allows them to identify flaws in crossing design, they should necessarily be able to compare and contrast the flawed design with correct, objective standards. Unless there are publicly available published standards which are developed through scientific method for evaluating the safety of rail crossings, the applicant has no means of proving safety and protestants can prevail simply through *ipse dixit* statements of an ostensible expert. This lack of objective standards in evident in this proceeding: during the Evidentiary Hearing SED objected to the submission into evidence of published safety standards. SED's objections were sustained by the ALJ, apparently on the basis that the safety standards were for "light rail".[48] SED has emphasized a distinction between "light rail" and "heavy rail" throughout the proceeding and specifically in these objections. However, when asked if the CPUC published a definition of "heavy rail", Stewart, SED's expert on "heavy rail" and "light rail",[49] could not provide specific information beyond that he believed so.[50] In this proceeding, any question regarding safety at Jennings Avenue has been settled by the specific at-grade crossing safety provisions discussed by CPUC staff and City staff, noted above. Even if this were not the case, it would be difficult or impossible to bear *"the heavy burden of proving safety*" in the absence of any defined standards.

SED claims that the City condones trespassing at Jennings.[51] In fact, however, the City has taken appropriate action for over 4 years now to improve the existing at-grade rail crossing at Jennings Avenue which, in addition to all other benefits, will resolve any trespassing issue within its jurisdiction. One of the grounds in SED's Protest refers to the possibility of elementary school children being at risk at the Jennings Avenue at-grade rail crossing due to the SMART commuter trains.[52] Once again, any question regarding safety at Jennings Avenue had been settled by the specific at-grade crossing safety provisions discussed by CPUC staff and City staff, noted above. Even if this were not so, SED has not expressed any appropriate concern about the fact that the

[48] Transcript, p. 163, lines 8-28 to p.166, line13.
[49] Transcript, p. 161, lines 22-23.
[50] Transcript, p. 189, lines 17-27.
[51] Protest of the Safety and Enforcement Division, filed June 4, 2016, p. 1. See also Opening Brief of the Safety and Enforcement Division, filed April 15, 2016, p. 11.
[52] Protest of the Safety and Enforcement Division, filed June 4, 2016, p. 1.

same children would be exposed to an even greater hazard at the Guerneville Road at-grade highway-rail crossing, with its motor vehicle traffic, greater level of pedestrian traffic, and the same SMART train traffic which passes through Jennings Avenue.

The record in this proceeding shows that, in the final analysis, SED's overarching purpose is to enforce the "parallel policy" - a "policy of no new at- grade crossings"[53] - "statewide".[54] There are other communities advocating for the creation of pedestrian and bicycle at-grade rail crossings as part of a goal to provide safe alternate routes for convenient and pollution-free transportation, and yet SED recommends denying the City's Application to avoid setting a "bad precedent" for any future applications.[55]

This proceeding involves the interpretation of statutes, regulations, and policies all of which present questions of law subject to independent judicial review. (*Southern California Edison v. Public Utilities Commission* (2000) 85 Cal. App. 4th 1086, 1096.) When there is no rational explanation as to how statutes, regulations, and policies relate to actual practice, there is nothing to support meaningful judicial deference. (*Id.* at p. 1106.) (See also *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal. 4th 1.)

For the reasons set forth above, James L. Duncan respectfully urges the Commission to issue a Decision in this proceeding approving the City of Santa Rosa's Application, A1505014, consistent with the authorities cited, and argument submitted by James L. Duncan.

Dated this 29th day of April, 2016, at Santa Rosa, California.

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By /s/ *James L. Duncan*
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[53] Transcript, p. 199, lines 13-15.
[54] Transcript, p. 194, lines 9-27.
[55] Stewart's Testimony, p. 11, line 26-28 & p. 12, line 1-2.